

No. 13,013

IN THE

United States Court of Appeals
For the Ninth Circuit

THOMAS JONES,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

The above-entitled action was instituted by the appellee in the District Court for the District of Alaska, Fourth Division, on the 9th day of January, 1951, in which action the appellee sought to recover possession, from the appellant and one Nell Kelly, certain lands situated within the Fourth Division, Territory of Alaska.

Separate answers were filed by the appellant and said Nell Kelly. The answer of appellant was filed on the 23rd day of February, 1951. On the 27th day of April, 1951, appellant served upon the United States Attorney, appellee's attorney, an amended answer, and lodged the same with the Clerk of the Dis-

trict Court, together with a motion for leave to file the same. The motion to file said amended answer was overruled by the Court and issues were joined upon the plaintiff's complaint and appellant's answer. A jury was empanelled and the testimony of the appellant and appellee was taken, and upon the conclusion of the taking of said testimony, the Court directed the jury to return a verdict in favor of the plaintiff, against appellant.

STATEMENT OF CASE.

The lands described in the appellee's complaint, the possession of which were sought to be recovered by appellee from appellant and the said Nell Kelly, were described in the complaint as follows:

NW $\frac{1}{4}$ of Section 34, Township 2 S., Range 3 E.,
Fairbanks Meridian,

which lands were embraced in a withdrawal order of Public Lands in Aid of Flood Control, which said executive order was issued December 3, 1938 and numbered 8020.

At the trial of the case, appellant offered to prove that he entered upon a portion of the above-described lands by virtue of a certain lease from the said Nell Kelly, who had entered upon the lands in 1943 under Homestead laws and who had made improvements upon the said lands. The appellant also offered to prove that he had made improvements on that portion of the lands hereinbefore described and that the

value of the improvements were approximately \$50,000.00. This offer of proof was denied by the Court.

**STATEMENT OF POINTS RELIED UPON
FOR REVERSAL.**

Appellant contends that the District Court erred in sustaining the motion of appellee for a directed verdict in its favor, upon the grounds that the appellee had failed to make out a *prima facie* case, in that they had failed to prove that at any time prior to 1949, had there been any section of land in the area of the Moose Creek Lodge, upon which were located the improvements of the appellant, designated as Section 34, Township 2 S., Range 3 E., Fairbanks Meridian, and, that up to the time of the trial of the said cause, no official map and plat of the said section had been made and filed in the Land Office at Fairbanks, Alaska.

Appellant further contends that the District Court erred in denying appellant's motion to file an amended answer in said cause (T.R. page 83).

Appellant further contends that the Court erred in overruling timely objections to the introduction of certain testimony offered by appellees (Pages 24, 28, 37, 38, 39, 40, 43, 44, 45, 53, 65 and 95).

ARGUMENT.

Taking the points relied upon for reversal, in the order in which they are stated, appellant contends that the evidence introduced in this case failed to make out a *prima facie* case which would justify the Court taking the case from the jury and directing the verdict for the appellee, upon the grounds that it had failed to prove that at the time Nell Kelly went upon the said lands in controversy that there existed any portion of the Public Domain designated as Section 34, Township 2 S., Range 3 E., Fairbanks Meridian.

The appellee attempted to show by Plaintiff's Exhibit "A" that certain lands had been withdrawn from Entry for Flood Control purposes, among which lands was designated Section 34, Township 2 S., Range 3 E., Fairbanks Meridian.

That upon the trial of the cause, the appellee failed to introduce any official map and plat of said section. That being aware of the lack of satisfactory evidence with which to prove the case, the United States Attorney moved that a recess be taken for a period of two days, to allow the appellee to send into the field a group of surveyors, the leader of which, Robert E. Lyle, later testified that he had run a course from the Northwest Corner of Section 9, Township 2 S., Range 3 E., Fairbanks Meridian, to a corner designated as a Witness Corner to the Northwest Corner of Section 34.

Upon cross-examination by appellant's attorney, witness Lyle testified that he had found this corner

and that the same had been established in 1949, and seven years after Nell Kelly, one of the defendants in said case, had entered upon the premises described in appellee's complaint, and which she later established as Moose Creek Lodge.

At the trial of the cause, appellant offered to prove that Nell Kelly had been placed upon the said lands by the United States Bureau of Land Management at a time when no surveys were available to indicate the boundaries of said section. That the said Nell Kelly had previously filed an application for a Homestead approximately three miles north of the Section 34, hereinabove referred to. That she was informed by the Bureau of Land Management that the land upon which she had filed her Location Notice was in the Flood Control area and would be unsuitable for the purpose of homesteading, and advised her that the SE $\frac{1}{4}$ of Section 27, Township 2 S., Range 3 E., Fairbanks Meridian, was open for location and entry, and that the supposed boundary of the said quarter-section was pointed out to her by the Director of the Bureau of Land Management at Fairbanks, Alaska, in 1943. That she entered upon the occupied lands under said entry until 1946, when she leased a portion of said lands upon which her improvements were placed, to one William Fitzinger, who later assigned the lease to appellant Thomas Jones. That upon the expiration of that lease, in 1948, she executed a lease of the said premises to Thomas Jones, for a period of five years, with option to renew for an

additional five years, and that pursuant to said lease, appellant made improvements thereon of the approximate value of \$50,000.00 (Testimony of Thomas Jones, T.R. pages 96 to 100, inclusive). This offered proof was refused by the Court upon the grounds that no damages were asked by the plaintiff from appellant Jones for withholding the said lands described in the complaint, and of which he was occupying approximately ten acres.

It is true that no damages were asked in appellee's complaint, but any damages that might have been recovered by appellee's prayer for such, were far outweighed by the actual damages which would ensue to the appellant by losing the investment of the value of \$50,000.00, which he had invested thereon.

Furthermore, the plaintiff failed to allege and prove that demand had been made on the appellant that he vacate the premises known as Moose Creek Lodge. Demand was a prerequisite to instituting suit against appellant. 28 *Corpus Juris Secundum*, Section 27, page 882, states:

“Such Notice or Demand is required where Defendant has entered and holds possession, that he cannot be treated as a trespasser, as where he is in possession under a contract right * * *”.

In the present instance Nell Kelly made a lawful entry upon the said lands with the consent and approval of the Bureau of Land Management, who indicated her lands, which the local Director believed to be open for Location.

Under the above, Nell Kelly was not a trespasser, nor was appellant Jones, and demand for the vacation of the said premises was necessary.

Appellant also offered to introduce in evidence, the lease from Nell Kelly to appellant, which offer was refused by the Court and constituted manifest error.

Fred Weiler, Manager of the Bureau of Land Management at Fairbanks, Alaska, testified that Nell Kelly had entered upon the said lands in 1942; that she claimed ownership of Moose Creek Lodge; that the lands were unsurveyed; and that she had erected on said land, a building 30 x 20 feet, and later added to said building.

Upon the offer to prove, by the said Fred Weiler, material allegations necessary to substantiate the allegations of the said complaint, the United States Attorney requested additional time in which to send surveyors to establish the boundaries of Section 34, Township 2 S., Range 3 E., Fairbanks Meridian, and to establish the fact that Moose Creek Lodge was in said Section, and the Court acceded to the request of the United States Attorney and postponed further proceedings until the second day following the recess (T.R. page 32).

That the only evidence regarding the boundaries of Section 34, Township 2 S., Range 3 E., Fairbanks Meridian, is testified to by Robert E. Lyle, plaintiff's witness, and was obtained during the recess above mentioned, and in that particular part of his testimony, the witness did point out that he

found no indication of any survey being made prior to the year 1949, and at no time did he find any corner of said Section 34. It is evident from that testimony that Nell Kelly and appellant were on Section 34 and such fact was not verified until after the beginning of the trial in the District Court. That at the time of filing the complaint in the above action United States Attorney had no factual knowledge as pleaded in said complaint. Furthermore, no evidence was offered that Nell Kelly was unlawfully on said lands in dispute, in fact, the contrary appears from the testimony of Fred Weiler, Manager of the Bureau of Land Management.

No evidence was offered that the said lands were located in the area designated as Flood Control Lands, although the executive order withdrawing certain lands for Flood Control was introduced in evidence, Plaintiff's Exhibit "A". In this connection, it is difficult to understand how such a withdrawal order could affect a nonexistent section of land or a part thereof.

It is further contended that the failure of the appellee to introduce in evidence an official survey of the lands described in plaintiff's complaint, would constitute a failure to prove the material allegations of the complaint, and that the Court erred in directing the verdict in favor of the appellee where there had been such a fatal failure to prove a material fact contending to show that there was such a section as described in the complaint and that the said appellant and Nell Kelly were unlawfully upon the said lands.

The rules of equity should apply in this case, to the same degree to the Government as to a private individual or corporation under like circumstances.

In the present instance, the Bureau of Land Management has removed Nell Kelly from certain lands which she had entered upon, for the reason that the same would be in the Flood Control Area and unsuitable for cultivation, pointed out to her lands which were open for entry and location, and that agents of the United States Bureau of Land Management had stood idly by while she had placed improvement upon the said grounds, and while the lessee, Thomas Jones, occupied the said grounds for a period of five years and allowed him to make further improvement to the premises, and then, without demand or notice, to bring an action, eight or nine years after the original entry upon the said land, to eject the said parties from the land in question and confiscate the improvements, which had been made in good faith and in reliance upon the fact that the lands had been entered upon lawfully by the parties.

Appellant respectfully contends that, in view of the foregoing fact, this Honorable Court of Appeals should issue its mandate to the District Court for the Territory of Alaska, Fourth Division, to enter a verdict in favor of the appellant, or, in the alternative, that the said cause be reversed and remanded for a new trial, with instructions to the said Court to allow the appellant to introduce in evidence the lease between himself and Nell Kelly and to prove at a retrial of the

said cause, all the matters offered in evidence by the appellant at the trial of the case.

The Court may take cognizance of the fact that no authorities are cited herein. That appellant feels that the matters involved herein are so elementary that no citation of authorities is requisite or necessary.

Dated, Fairbanks, Alaska,

December 7, 1951.

Respectfully submitted,

WARREN A. TAYLOR,

WILLIAM V. BOGGESS,

Attorneys for Appellant.